No. 463. 141.

Brief of Wintersteen, Lincoln & Choate for

Filed Dec. 2, 1896.

United States Supreme Court.

No. 463. October Term, 1896.

PULLMAN'S PALACE CAR COMPANY,

Appellant,

vs.

CENTRAL TRANSPORTATION COMPANY,

Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

BRIEF OF EDWARD S. ISHAM FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

INDEX.

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ROBERT T. LINCOLN,
EDWARD S. ISHAM,
JOSEPH H. CHOATE,
Of Counsel for Appellant.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

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Appellant,

vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF OF EDWARD S. ISHAM FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS THE APPEAL.

Statement.

This appeal is taken in conformity, it is thought, to the provisions of the Act of Congress of March 3, 1891. By the fifth section of that act appellate jurisdiction is given exclusively to the Supreme Court,

> "In any case that *involves the construction or application* of the Constitution of the United States.
>
> "In any case in which the constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States."

If either of these conditions exist, this Court has exclusive appellate jurisdiction to review and determine not only the questions involved therein, but equally all other questions and issues contained in the Record.

The present motion to dismiss this appeal is founded on the assertion that none of these conditions of appeal to this Court are presented by the Record. This is the matter, therefore, which we have to examine.

A recital of the issues presented, without argument or discussion of them but sufficient to show in what relation these questions arise, seems unavoidable. Counsel for appellee have adopted and submit on this motion as their statement of the circumstances and issues of the case below the report of that case, which is contained in 72 Fed. Rep., page 211. We do not accept the presentment made by this report, by whomsoever it may have been prepared, either of the circumstances or issues of this case, or of the positions of the present appellant in the court below. The interest involved is too great and the issues too grave to make any uncertainty permissible, and we prefer such reference to the Record itself as will show the actual issues in a way not open to objection or to criticism.

This appeal is taken from what is purely a money judgment rendered on a so-called cross bill.* Ac-

* The following is the "decree" (Record, p. 1197):

U. S. C. C., E. D. of Pa., October Sess., 1886.

PULLMAN'S PALACE CAR COMPANY vs. CENTRAL TRANSPORTATION COMPANY.	No. 44.
CENTRAL TRANSPORTATION COMPANY vs. PULLMAN'S PALACE CAR COMPANY.	Cross-Bill.

And now, January 24th, 1896, the above cause having been heard upon exceptions to the report of Theodore M. Etting, Esq., Master, and having been argued by counsel for the respective parties and considered by the Court, it is ordered and decreed in conformity with the opinions of the Court filed:

FIRST.—That both the exceptions filed by the Central Transportation Company and the exceptions filed by Pullman's Palace Car Company to the Master's report be dismissed.

SECOND.—That Pullman's Palace Car Company pay to the Central Transportation Company the sum of four million two hundred and thirty-five thousand and forty-four dollars.

THIRD.—That Pullman's Palace Car Company pay the costs of this cause incurred on account of the cross-bill.

cording to the view presented by appellee, the original bill would seem to have been filed primarily to procure a decree annulling a contract of lease, then subsisting between the parties, on the ground of its illegality. This was the lease which received the consideration of this Court in the case of *Central Transportation Company* v. *Pullman's Palace Car Company*, 139 U. S., 24, and was the subject matter of its judgment in that case. The original bill in this case is shown in the Record at page 1. It was filed January 25, 1887; but before it was filed a judgment at law had been rendered against the complainant, the Pullman Company, for an installment of rent accruing under that lease. This judgment had been appealed from and the bill was filed pending that appeal. The judgment was reversed by this Court in the case of *Pullman's Palace Car Company* v. *Central Transp. Co.*, 139 U. S., 62. Other successive actions at law for subsequent quarterly installments of rent were also pending, and among them the one that afterwards came before this Court in the case first above cited, viz.: *Central, &c., Co.* v. *Pullman, &c., Co.*, 139 U. S., 24, in which the lease was held to be illegal and void. Now, reference to this original bill will show that in its primary and practically single purpose it sought the aid of the Court in carrying into effect, and in affirmatively executing certain provisions of the lease itself. They were those provisions which were contained in the eighth section of the lease which was before this Court, and quoted and construed in the case above cited of the *Pullman, &c., Co.* v. *Central Transp. Co.*, 139 U. S., 62. That Section "Eighth," under specified circumstances, authorized a modification or termination of the lease itself, and in case of such termination specific terms of the lease provided for and governed the restoration of the demised property.

Such restoration, conforming strictly to the terms of the lease, had become impossible, and the bill, alleging an election to terminate the lease declared

in June, 1886 (Rec., p. 35), prayed the aid of the Court in making a substantial instead of a strict performance of its requirements.

In that connection the bill also averred that the complainant had in January, 1885, formed and declared its purpose to *then* terminate the lease, but had been dissuaded therefrom and induced to accept the alternative provided in Section "eighth," of paying the defendant an equitable share of the revenues that might be realized under the lease; that this was then agreed to by the defendant, and the agreement afterward repudiated. The bill prayed, therefore, that the Court *would decree whether the election* made in January, 1885, to pay a share of the net revenues instead of terminating said lease, *was not conclusive and binding upon* both parties thereto. If *not*, it prayed that the act of termination declared in June, 1886, *might relate back* and take effect in January, 1885; and it prayed injunction against the further prosecution of suits at law for rental accruing after January, 1885.

In an entirely subordinate and substantially incidental way the bill *submitted* to the Court for consideration a question whether the lease itself was valid. It contained *no prayer* that it should be held void, and its attitude upon that subject was absolutely passive. It stated the advice of counsel which complainant had received, submitted it to the Court, and asked that it would consider and decree whether the contract was enforceable by either party. The clauses upon that subject are found in the Record, at page 20. This is the part of the bill which, for the sake of supporting the cross-bill, was suddenly, and after the lease had been held void by the Supreme Court, magnified into proportions unheard of before.

The bill *did not* pray that the lease should be declared void for illegality. It *did not repudiate or disaffirm it*, or *refuse on that ground to pay rental* or otherwise perform its terms. On the contrary,

the prayer of the bill was for execution of provisions of the lease itself.

The answer of the Central Transportation Company of April 15, 1887 (Rec., p. 55), denied the rights asserted by the complainant in the original bill concerning the termination of the lease; insisted that all the issues between the parties were "such as were properly determinable only on the common law side" of the Court (Rec., p. 63), and averred there was no such difficulty in the way of performance by complainant of the conditions of their right to annul the lease as justified their application to a court of equity for relief; and said "the questions involved are questions of fact peculiarly determinable by jury" (Rec., p. 65). It emphatically *repudiated and rejected all tenders and offers of compensation proffered by the bill* (Rec., 63, 65, 537, 555), and said, "under the advice of counsel," that the lease was legal "and that if it were not legal "such illegality did not justify an application by "the complainants for equitable relief." In *performance of the terms of this contract of lease*, and for its purposes, certain property had been transferred and delivered by the Central Transportation Company to the lessee. It was a transfer of *all* the property and of all the resources it possessed (*Rec.*, p. 536), for the conduct of its business. This property consisted of the railway cars and equipment then owned and in use by the Central Transportation Company, and of a sum of money amounting to about seventeen thousand ($17,000) dollars. There were also assigned certain *contracts* with railway companies, of varying duration, under which the Central Company was operating its sleeping-car service on their lines, and certain patent rights.

While this bill was pending and the cause proceeding regularly, the judgment of this Court was announced in the case of *Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S., 24. In that case the lease itself, the affirmative enforcement of which,

by the aid of the Court was sought by the original bill in this cause, was held to be illegal and void. The reasons for which the Supreme Court held it to be illegal, and consequently void, were three:

FIRST.—That it was technically *ultra vires* of the Central Transportation Company, that is, it was beyond the powers conferred by the Legislature upon that company.

SECOND.—That it was a violation of public policy by the Central Transportation Company in that "it involved an abandonment of its duty to the "public," for it *parted "with all its means of car-"rying on the business and performing the duty for "which it had been chartered,"* and undertook to transfer for a period "nearly co-extensive with the "duration of its own corporate existence the whole "conduct of its business and the performance of all "its public duties to another corporation."

THIRD.—That the contract, because it contained a specific covenant on the part of a public corporation, the Central Transportation Company, not to engage in the business, or to perform at all anywhere the duties to the public for which it was incorporated, during the continuance of the lease, was void, "because in unreasonable restraint of "trade, and therefore contrary to public policy."

The contract of lease, therefore, was held illegal and void, not only because technically *ultra vires*, but also because in *two* distinct particulars in *violation of public policy* and of public duty.

The record shows this judgment of this Court reviewed and a contrary conclusion reached by BUTLER, District Judge, sitting in the Circuit Court.*

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* We give, side by side for easier comparison, the language of this Court in its judgment on the construction of this lease and the language of the opinion stating the subsequent decision of the Court below:

It is not easy to understand how the District Judge found this question open at all for his review. This Court had already considered and construed this contract of lease, and its conclusion is quite at variance with the subsequent decision of

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Extract from opinion of Mr. Justice Gray, 139 U. S., p. 51:

"The evident *purpose* of the Legislature, in passing the statute of 1870, was to enable the plaintiff *the better* to perform its duties to the public, by prolonging its existence, doubling its capital and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers and cease to perform those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking towards that end, than are to be found in this statute.

"In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this Court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely or for a long period of time, of the right to exercise the franchise granted to it by the Legislature for the accommodation of the public.

"By the contract between these parties, as expressed in the indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, all existing patent rights under which other cars might be constructed, and all other personal property, moneys, credits and rights of action of the plaintiff. But *after* the cars and the railroad contracts may have ceased to exist, and *after* all those

Extract from opinion of Butler, District Judge, filed December 18th, 1894, Rec., p. 1128:

"The Pullman Company's answer to the cross-bill, denying responsibility for the property received, raises the principal question before us. The denial rests on the fact that the property was transferred under an unlawful contract.

"The following propositions respecting such contracts may be affirmed with confidence: First, that the Courts will not enforce them; second, that the Courts will not interfere for the relief of either party when they have been executed; third, that the Courts will interfere to compel restitution of property received under such contract by one who repudiates it, except when the contract involves moral turpitude. These propositions find ample support from text writers and the courts. The third only is involved here, and, omitting what is embraced by the exception, it is indisputable. What constitutes "moral turpitude" or what will be held such is not entirely clear. A contract to promote crime certainly involves it. A contract to promote public wrong, short of crime, may or may not involve it. If parties *intend* such wrong, *as where they conspire against* the public interests, *by agreeing to violate the law or some rule of public policy*, the act doubtless *involves moral turpitude*. When no wrong is contemplated, but is unintentionally

the Court below, that the "question of interpretation" "was a close and difficult one;" that the "Statute of 1870," which enlarged the capital and extended the corporate life of the company, "*was* "*supposed to confer full authority*" to "imme-

patent rights must have expired, the indenture is *still* to continue in force for the full term of ninety-nine years, unless sooner terminated as therein provided. In addition to all this, the plaintiff *covenants*, in the most express and positive terms, never to 'engage in the business of manufacturing, using or hiring sleeping cars' while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and of performing the duty, for which it had been chartered, of transporting passengers and making and letting cars to transport them in; but it undertakes to transfer, for ninety-nine years, nearly co-extensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation; and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation, the stipulated rent or compensation, and of making dividends out of the moneys so received.

"Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank *avowal* in the indenture itself of the *intention* of the two corporations to prevent competition and to create a monopoly, there can be no doubt committed, through error of judgment, it is otherwise. "Turpitude" is defined by Webster to be "inherent baseness or vileness of principle, or acting, shameful wickedness." No unintentional wrong or improper act innocent in purpose can involve it. When individuals or corporations enter into contract in excess of authority or violate some rule of law unintentionally, the act does not involve moral wrong, much less turpitude. The subject has been much before the courts, and, while loose and misleading expressions appear occasionally, the decisions are all reconcilable with this statement. * * * It seems to be true that the distinction between *malum prohibitum* and *malum in se* (which never had the support of just reason), has disappeared. This, however, is unimportant. The distinction never had any legitimate bearing on the question.

Thus it follows that unless the execution of the contract between the Central Transportation and the Pullman Palace Car Company involves moral turpitude, as before described, the former may recover back the property parted with under it. That it does not involve such turpitude seems clear. *Neither party contemplated any* wrong. Both believed the contract to be lawful. The Statute of 1870 *was supposed to confer full authority to make it.* The State had, unquestionably, power to grant the authority, and the evidence shows that the statute was

diately abdicate" its "powers," and the discharge of its public functions, and "to covenant in the "most express and positive terms never to en- "gage" in its corporate business while the lease should be in force; and that "*all that can justly* "*be said*, therefore, is that the parties miscon- "strued their authority, and that the lease is, "consequently, *ultra vires*." In the adjudication of this Court, the lease was held unlawful not merely because unauthorized, and so technically *ultra vires*, but also specifically *because* it was an

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that *the chief consideration* for the sums to be paid by the defendant was the plaintiff's *covenant* not to engage in the business of manufacturing, using or hiring sleeping cars; and that the *real purpose* of the transaction was, *under the guise* of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the *single purpose of receiving compensation for not performing its duties.*

"The necessary conclusion from these premises is that the contract sued on was unlawful and void, *because* it was beyond the powers conferred upon the plaintiff by the Legislature, *and because* it involved an abandonment by the plaintiff of its duty to the public.

"There is a strong ground also for holding that the contract between the parties is void because in unreasonable restraint of trade, and therefore contrary to public policy. * * * A contract by which a corporation, chartered to perform the duties of a common carrier, or any other duties to the public, agrees that it will not perform those duties at all, anywhere, for ninety-nine years, *is clearly unreasonable and void.*"

procured for the express purpose of granting it. The question whether the statute did or did not grant it was a close and difficult one. The learned counsel of the parties and the Court disagreed on the subject. It was a question of interpretation. In the Court's view the lease was *ultra vires* and void; in the counsel's it was authorized and lawful. True, it violated a rule of public policy, but this was *only because the Court construed the statute more narrowly* than the legal advisers of the parties had done. The Legislature is the judge of what the pub, lic interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen. *All* that *can justly* be said, therefore, is that the parties *misconstrued their authority*, and that the lease is consequently *ultra vires*. * * * The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must therefore be made,

affirmative violation of public policy in that it involved an abandonment of its public duties by the lessor, and because its specific covenant not to perform those duties at all, anywhere, for ninety-nine years, was "contrary to public policy" and "clearly unreasonable and void." It is, however, *upon the difference* between the construction of the contract by this Court and that of the Court below, that the decree is founded from which this appeal is taken. The only questions relate to the effect to be given to the judgment of this Court, and to whether it may be neutralized and evaded.

It was in pursuance of the provisions of the lease thus construed by this Court that the property now in question was transferred. That transfer became part of the *executed* terms of the lease. The lease stipulated for the transfer of all the property and resources of the Central Transportation Company and the abandonment of its business, and it is admitted in the Record (p. 536, 554), that such transfer and abandonment were made in full performance and execution of the agreement of the lease to that effect. Although the rule would seem to be settled in the Courts of the United States (*C. H. & D. R. Co.* v. *McKeen*, 64 Fed., Rep. 46, that the executed dealings under a contract, unlawful and void for the reasons that rendered *this act of transfer*, as well as the *contract* to make it, unlawful, will not be interferred with by the courts, this cross-bill was brought solely to recover the possession of the property transferred, or its value, and damages for its detention and for the *loss* of the "abdicated" and abandoned business.

At that stage, plainly, nothing whatever remained of the functions of the original bill. It had no longer any office whatever to perform, and *no one* was seeking any relief under it whatever. All its proffers of restoration and compensation had been rejected by the answer, which had been framed in terms studiously arrogant and injurious. Its only element of equitable nature, namely, its appeal for

aid of the Court of Equity in terminating the lease with relation back to January, 1885, and in making a restoration of property to suit its terms, was extinguished by the judgment of this Court, that the lease itself was unlawful and void *ab initio*. If we concede the claim of appellee that the bill was filed to set aside the lease for illegality, then the judgment of this Court had left only that part of the bill remaining, but clearly such a bill could not be entertained by the Court, for the case presented was *identical* with that of the *St. Louis, Vandalia, &c., R. R. Co.* v. *Terre Haute, &c., R. R. Co.*, 145 U. S., 393, in which the bill was dismissed upon demurrer. So the appellee claimed in its answer to the original bill. (Rec., p. 65.) The original bill, therefore, had become at that stage empty altogether. *As it then stood* there was *nothing to do* but to dismiss it. The complainant therefore, on the *sixth* day of April, 1891, moved for leave to dismiss its bill at the complainant's cost, and afterwards, on the *twenty-fifth* day of April, 1891, this motion, after hearing, was taken under advisement by the Court. Thereupon on that twenty-fifth day of April, 1891, "the defendants moved the "Court for leave to file a cross-bill, in which they "would avail themselves of the tenders of relief "made by complainants in their bill." As has been already stated, all tenders or proffers made by the bill had been at the outset summarily rejected, and *meanwhile* the complainant had itself abandoned its bill and moved for its dismissal. Subsequently, on the tenth day of December, 1891, the Court again by its order took under further consideration the complainants' motion for leave to dismiss the bill and the respondent's motion for leave to file a cross-bill, and on the fourteenth day of December, 1891, gave leave to file the cross-bill and refused the complainant's motion to dismiss its bill. (Rec., 551-3.)

Accordingly, since leave to dismiss the original bill was refused, the entire litigation has proceeded upon the so-called cross-bill and *upon that only*. The

whole subject matter of the existing controversy was introduced by the cross-bill, and the only issues which have been litigated and discussed are those presented by it. Not a step in the original cause, or connected with it, has been taken since the motion to dismiss. The cross-bill was grounded upon nothing in the original cause. It did not purport to accept or otherwise to "avail" itself, as the motion for leave to file it stated that it would do, of any "tenders" of the bill which had been originally rejected and never renewed. The claim of the cross-bill was founded upon an *implied obligation* to return the property, which it stated had been delivered "in "pursuance of the agreement" (Rec., p. 554) of lease which had been found unlawful and void, so that *the purpose had failed for which the delivery was made.* It relied upon an alleged obligation to return, not arising from any contract or covenant known in any way to the original cause, but arising by *implication of law* merely from the admittedly *unlawful act* of transfer of property belonging to the cross-complainant *for the unlawful purposes* of the lease. But such an obligation arose, if at all, outside of and apart from the original cause. It was one that by its nature could not arise at all until *after* the judgment of this Court, by holding the lease *and* the transfer *equally* unlawful, had extinguished the functions of the original bill and the *raison d'être* of the cause. The so-called cross-bill therefore constitutes purely and simply an independent suit for the enforcement of a legal title to specific property and to recover its possession, or its value, and damages, among other things, for its detention.

The questions presented.

By Section 5 of the Act of 1891, appeals may be taken directly to this Court from the Circuit Courts "in any case that involves the construction or ap- "plication of the Constitution of the United States, "and in any case in which the constitution or law "of a State is claimed to be in contravention of the "Constitution of the United States." In the proceedings and on the hearing below, two questions arose which appeared to involve the application, and one of them perhaps the construction, of the Constitution of the United States. One of these questions included also a *claim* that a statute of the State of Pennsylvania was in contravention of the Constitution of t he United States and that it was held by the Court not to be so, and that such holding was a *denial* of a Constitutional right claimed by the appellant.

The first question presented itself in this form: The appellant, as has been stated, had abandoned its original bill and moved its dismissal, but this application was *refused;* and, on the contrary, the Court retained the bi l, abandoned upon the record, and compulsorily held the complainant in court for the sole and declared purpose of holding on to a jurisdiction of the parties in order to give opportunity to the defendant to pursue by a cross-bill, and in a court of equity, a purely legal claim of right. After all its objections had been overruled, the complainant, by its answer to the cross-bill, took the ground that the alleged title asserted by the cross-bill to the property was a strictly *legal* title and was the proper subject matter of an action at law, if any action for the recovery of property or compensation therefor in damages existed; and that under the Constitution of the United States the Court of Equity had no right to take cognizance thereof. At every stage of the cause appellant has insisted upon this right, and that the question being

one of legal title and legal damages it came within the constitutional guarantee of trial by jury, and this claim is presented by the seventh and eighth assignments of error, which are as follows:

> "7. The Court erred in holding that the subject matter of the said cross bill being matter of a purely legal nature and of the enforcement of a purely legal right, was not excluded from the cognizance of equity by force of the seventh amendment to the Constitution of the United States.
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> "8. The Court erred in not holding that the subject matter of said cross-bill was the proper subject matter of action at law only, and of trial at law and by jury, both under the provisions of the seventh amendment of the Constitution of the United States and of Section 723 of the Revised Statutes of the United States."

Notwithstanding this objection, the Court proceeded to try the cause, to adjudge the title to the property, to assess its value and to enter a money decree for damages, in disregard of the constitutional right invoked by the appellant.

Another question arose on the trial below which seems clearly to bring the case within the conditions of direct appeal to this Court. Under the decision of the Court below, already quoted from (pp. 7-9, *ante*) (Rec., pp. 1126-1133), the value in 1870 of the property of the appellee which was then transferred to the appellant "in pursuance of the agreement" contained in the lease, was directed to be inquired into and ascertained in order to fix thereby the amount of compensation or damages therefor to be adjudged against the appellant. There were among these properties certain operating contracts with railways which were in terms limited to run "during the "continuance of the incorporation of the party of "the first part," the appellee. When these contracts were made the Central Transportation Company was incorporated under a *General Law* of

Pennsylvania (Rec., p. 531) for a specific term which was to expire December 30, 1882. In 1870, some years after the making of these contracts and before the making of the lease, the Central Transportation Company procured from the Legislature of Pennsylvania a *Special Act* which gave it, among other things, an additional period of ninety-nine years of corporate life. On the trial below it was claimed against the appellant that this statute of 1870 had the legal effect of extending the term and the force of these contracts for the additional period of ninety-nine years, and that in appraising their value in 1870 they were to be charged against appellant, not as contracts expiring in 1882 and having twelve years to run, but as contracts having one hundred eleven years to run, obligatory upon the several railways for that period, and of corresponding value. No assent of the railroads to this prolongation of these contracts was pretended; but the Master held, and the Court affirmed his conclusion, that such was the legal operation and effect of this Special Act of the Legislature of Pennsylvania. This conclusion of the Court, that these contracts were in 1885 still existing and valid contracts for the prolonged term, although except for this effect of the Statute they would have expired in 1882, became the basis of the decree from which this appeal is taken.

All this was made the subject of exception to the Master's report (Rec., p. 1191), and is the subject matter of a separate assignment of error which is as follows (Rec., p. 1202):

> "23. The Court erred in holding that the finding of the Master was correct; that certain railway contracts belonging to the Central Transportation Company and which were originally made to continue 'during the continuance of incorporation' of the Central Transportation Company were continued in force and extended for the period of 99 years by force of the Act of the Legislature of the State of Pennsylvania of the 9th of Feb

> ruary, A. D., 1870, by which the said transportation company was given a corporate life for a period of 99 years from the time of the expiration of its then existing charter; and the Court erred in not holding that such effect of the said Legislative act of the 9th of February, 1870, was in conflict with and would be forbidden by Article 1, Section 10, of the Constitution of the United States, which prohibits on the part of the States any enactment impairing the obligation of contracts."

Appellant's counsel considered that in this question the case involved the application and *also* the construction of the Constitution of the United States.

They are of opinion, also, that it presents within the provision of the fifth section of the Act of 1891 a case in which the law of a State was "*claimed* to be in contravention of the Constitution of the United States." Such was certainly the *claim* of the appellant, and the claim was denied by the legal effect which, contrary to such claim and in the teeth of the constitutional prohibition, was given by the Court to the Statute of Pennsylvania. In the opinion of appellant's counsel, therefore, there is given in this cause by the fifth section of the Act of Congress of 1891 direct appeal to this Court, because, *first*, there is presented under the seventh amendment a case that involves the *application* of the Constitution of the United States; *second*, under that clause which prohibits on the part of the States any enactment impairing the obligation of contracts there is presented a case that involves the *construction* and the *application* of the Constitution of the United States; and *third*, that under the same clause there is presented here a case in which a law of a State is *claimed* to be in contravention of the Constitution of the United States.

Argument.

1. *Taking cognizance in equity of the issues presented by the cross bill was itself a denial of the constitutional right guaranteed by the Seventh Amendment; and the right being thereby denied, the case involves the application of the Constitution.*

The Seventh Amendment to the Constitution declares that, "In suits at common law, where the "value in controversy shall exceed $20, the right of "trial by jury shall be preserved;" and in construing this clause the Supreme Court of the United States, in *Parsons* v. *Bedford*, 3 Pet., 447, held that it meant, "not merely *suits*, which the "common law recognized among its old and settled "proceedings, but suits in which *legal rights* were "to be ascertained and determined, in contradis-"tinction to those where equitable rights alone "were recognized, and equitable remedies were ad-"ministered." The Court further said: "In a just "sense, the amendment may well be construed to "embrace *all suits* which are not of equity and "admiralty jurisdiction, *whatever may be the pecu-"liar form* which they may assume to *settle legal "rights*" (*Bains* v. *The James & Catherine*, Baldw., 544. This Court again, in *Lewis* v. *Cox*, 23 Wall., 466, said, it is the universal practice of courts of equity to dismiss the bill if it *be grounded on a merely legal right*. In such case the adverse party has a *constitutional right* to trial by jury.

In the present case a cross-bill was filed founded directly on the *assertion of the legal title* to certain specific property. It demanded the *recovery of the property* or compensation for it in damages; and an assessment and recovery of money damages for the loss of business, which appellant had covenanted to abandon and had abandoned (Rec., p. 536).

To this objection was made that the case was one of the enforcement of a *legal title*, and was in the

nature of a suit in replevin or in trover "under the guise of a suit in equity" (*The Sultan* v. *The Providence Tool Co.*, 23 Fed., 572), and was the proper subject matter of an action at law; and that it was excluded from the cognizance of equity *by the Constitution* of the United States.

Is not such a case one that involves the application of the Constitution of the United States? If not we are at a loss to see how such a case can arise, or how the Constitution upon that subject can ever be given any operation.

Counsel for appellee, in their argument on this motion (p. 24), say:

> "The fallacy of the appellant's contention lies in the assumption that whenever the result of a decision is to deprive a party of an opportunity to try a question before a jury, a constitutional question is necessarily involved. There are many decisions which do not involve constitutional questions, but which indirectly take away the right of trial by jury. Whenever at common law the court sustains a demurrer to the declaration or complaint or directs a verdict, and whenever in equity the court overrules a demurrer based on want of equity or the existence of an adequate remedy at law, the result is the taking away of the opportunity to try before a jury; but such decisions are in no proper sense decisions of constitutional questions. The Seventh Amendment to the Constitution of the United States merely 'preserves' the 'right of trial by jury in suits at common law,' and if under the application of the principles of common law or of equity as they existed at the time of the adoption of the Constitution, the right to a jury trial does not exist, the constitutional provision has no application."

With due respect we submit that all this has *nothing to do with* the matter which is in hand. No suggestion on our part is involved that in instances where, according to the course or authority of the common law, the right of trial by jury *did*

not exist at the time of the adoption of the Constitution, the provisions of the seventh amendment should be now applied. It was according to the course and authority of the common law that a demurrer might be sustained, holding as *matter of law* that no cause of action was presented by the declaration; and so a court might direct a verdict for the defendant when satisfied upon the evidence that as *matter of law* the plaintiff was not entitled to recover, and when it could see that it would be constrained to set aside a verdict in his favor. But no one will contend that *such legal rights* as are asserted by this cross-bill were not at the time of the adoption of the Constitution, and always, entitled at common law to the decision of a jury. The clause was already in force in the Third Article of the Constitution which established the fundamental distinction between law and equity in the judicature of the United States, and so were the provisions of the 16th Section of the Judiciary Act of 1789, which has become Section 723 of the Revised Statutes; but the seventh amendment owed its existence to the general apprehension notwithstanding those clauses that some supremacy of prerogative might come about which would impair the right of trial by jury. It is the express declaration of this Court that "the "want of an *express* provision securing the right "of trial by jury in civil cases led to the adoption "of the amendment" (*Parsons* v. *Bedford*, 3 Pet., 447). The provisions of the 16th Section of the Judiciary Act have been held to be only declaratory of the rule which would prevail without them; but it can hardly be pretended that where the Constitution has supervened and established a right, the application of the Constitution fails to be involved because the same right was already prescribed by an Act of Congress, or by a precedent rule of the common law. Such a suggestion concerning the source of dominant authority is confronted by the question, what is the "supreme law of the land?" Whatever the

case may be when the Constitution is silent, there will be no doubt that when the Constitution does deal expressly with any subject, it is the supreme source of authority upon every question of right or obligation to which its provisions relate; for this is but a minor application of the rule, "When the ALMIGHTY speaks let the kings of the *earth* keep silence."

Nor, referring to the suggestions of counsel in the argument above quoted, is it necessary at all for us to claim that a question under the Constitution arises in every case in which a bill is held to be without equity. This cannot have been the intent of Congress in the Act of 1891. But we say without hesitation, what this Court has declared, that, whenever a case is presented, in any form of proceeding, for the trial of a right distinctly legal in its nature, and *which at the time of the adoption of the Constitution was triable by jury at common law*, the seventh amendment *guarantees* the right to that mode of trial; and the application of the Constitution is involved whenever that right is disregarded. If a suit is brought in equity upon a cause of action of purely legal nature, for the determination of an issue which, by the common law existing when the Constitution was adopted, would be triable only by a jury, as, for example, a suit to recover possession of a horse, or of land; a suit to recover a money debt claimed to be due on a promissory note or other contract; a suit to ascertain and recover money damages for injury to an established business, or for conversion of specific property; or a suit by a simple contract creditor, one whose debt has not yet been ascertained by judgment, to ascertain and establish that debt preliminary to a claim of equitable relief in the same suit; in such cases it is nothing to the case to say that the Judge decided merely "under the general principles of equity jurisprudence" that courts of equity could take cognizance of those issues and that it was an ordinary error of law like any other. His decision in *such case* is *also* a

denial of a constitutional right. If a judge in equity will force a defendant to submit to the trial by him of an action for damages for trespass, and to what he may call a decree therein for damages, then he has gone beyond the limits of ordinary error. He has acted upon a subject matter *not within the general powers* of his court. He has denied a common law right which is guaranteed by the Constitution. If in the particular case the right of trial by jury existed at common law, it has the *guaranty of the Constitution.* It is doubtless *error* in an equity court to proceed in disregard of that, but that is not all. If the *right is within the guaranty* of the Constitution, the *case involves the application of the Constitution*, if the guaranty is invoked by a party, and even if it is not; for the question may be raised by the Court *sua sponte.* If the constitutional guaranty is denied, the party becomes thereby entitled to the judgment of this Court; and this right is not to be evaded and defeated by the illusory suggestion that there has occurred *merely* a decision "under the general principles of equity jurisprudence that the respondent was entitled to affirmative relief by cross-bill." The judicial action of the equity courts is, upon that subject, subordinate to the constitutional guaranty and involves its application. The rule and the line of discrimination are accurately declared by Mr. Justice MATTHEWS, in *Root* v. *Railway Co.*, 105 U. S., 206, where he said:

> "Indeed, it is the *settled* doctrine of this Court that this *distinction of jurisdiction*, between law and equity, *is constitutional to the extent* to which the seventh amendment forbids any infringement of the right of trial by jury *as fixed by the common law.*"

That is to say, it is constitutional *to the extent* to which issues, *legal* in their nature, were at common law, when the Constitution was adopted, triable by jury. We append several citations from familiar

cases simply because they serve to illustrate the uniformity with which this Court has, throughout its history, maintained the line of discrimination indicated, and show how firmly it has established the "settled doctrine" stated by Mr. Justice MATTHEWS that the right in question here "*is* constitutional *to the extent* to which the seventh amendment forbids any infringement of the right of "trial by jury *as fixed by the common law.*" The matter is well stated in *Gordan* v. *Jackson*, 72 Fed., 87. There the Circuit Court said:

> "These suits *are, in effect, an effort*, on part of an alleged owner out of possession, *to recover from a party in possession lands alleged to be improperly withheld.* That such a right was, at the *time of the adoption of the Constitution* and statute cited above, cognizable at law, is a proposition that cannot be controverted. * * * If, then, the complainants are permitted to maintain this suit, the defendants *will be denied the right* to a trial by jury *guaranteed by the Constitution*, and the statute, which forbids a suit in equity where a plain, adequate and complete remedy may be had at law, will be disregarded. *The fact that this case would have been cognizable at law when the Constitution was adopted brings it within the guaranty of a right to trial by jury.*"

In *Hipp* v. *Babbin*, 19 How., 277, this Court said:

> "The bill in this cause is, in substance and legal effect, *an ejectment* bill. The *title appears by the bill to be merely legal.* * * * And the result of the argument is, that whenever a court of law *is competent* to take cognizance of a right, and *has power* to proceed to a judgment, which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a *constitutional* right to a trial by jury."

In *Kilian* v. *Ebbinghaus*, 110 U. S., 572, this Court said:

> "The *fatal objection* to the suit is, that it is in fact an attempt by the party *claiming the legal* title to *use a bill in equity* in the nature of a bill of interpleader *as an action of ejectment. The record makes this apparent*, * * * and this objection to the jurisdiction may be enforced by the Court *sua sponte*, though not raised by the pleadings nor suggested by counsel."

To the same effect is the case of *Parker* v. *Winnepiseogee, &c. Co.*, 2 Black, 550.

In *Thompson* v. *Railroad Companies*, 6 Wall., 137, this Court said:

> "The suit brought in the State court *was nothing but an ordinary action at law.* When it was removed to the Federal court, a bill in equity (alleging the same cause of complaint) was substituted by leave of the Court, for the petition originally filed in the State court, and the suit progressed as a cause in chancery. Thus, an action at law, which *sought solely to recover damages for a breach of contract*, was transmuted into a suit in equity, and the defendant *deprived of the constitutional privilege* of trial by jury."

In *Whitehead* v. *Shattuck*, 138 U. S., 146, a bill was filed to recover and quiet title to certain lands, to which demurrer was sustained. Mr. Justice FIELD said:

> "It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity, as distinguished from an action at law, for particular elements may enter into consideration, which would take the matter from one court to the other; but this may be said, that, *where an action is simply for the recovery and possession of specific real or personal property*, or for the *recovery of a money judgment*, the action is one *at law*. An action

> for the recovery of real property, including damages for withholding it, has always been of that class. The right, which in this case the plaintiff wishes to assert, is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment. And in a contest over the title both parties have a *constitutional* right to call for a jury."

Scott v. *Neely*, 140 U. S., 106, was a suit in equity to subject property to the payment of a simple contract debt, but *in advance of any proceeding at law to establish the validity and amount of the debt.* This Court by Mr. Justice FIELD said:

> "The Constitution, in its Seventh Amendment, declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the Federal courts *this right can not be dispensed with*, except by the assent of the parties entitled to it, nor can it be *impaired by any blending* with a claim properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency. Such aid, in the Federal courts, must be sought in separate proceedings, to the end that the right to a trial by jury in the legal action may be preserved intact.
>
> "In the case before us the *debt due* the complainants was *in no respect different from any other debt upon contract;* it was the subject of a *legal action only*, in which the defendants were entitled to a jury trial in the Federal courts. * * * *All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the Federal courts only on their law side.*"

Cates v. *Allen*, 149 U. S., 451, was another case in which simple contract creditors sought certain relief in equity *in advance of any judgment* or legal

proceedings upon their contracts. Although authorized by the Code of Mississippi it was held by this Court that such a proceeding would be unlawful in the courts of the United States, because in violation of the constitutional provision. The Court, by Chief Justice FULLER, after citing *Scott* v. *Neeley* and other cases, said:

> "The Code of Mississippi in giving to a simple contract creditor a right to seek in equity in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property, whereby the whole suit *involving the determination of the validity of the contract and the amount due thereon, is treated as one in equity to be heard and disposed of without a trial by jury*, could not be enforced in the courts of the United States, *because in conflict with the constitutional* provision by which the right to a trial by jury is secured. * * * And as *the ascertainment of the complainant's demand* is by action at law, the fact that the chancery court has the power to summon a jury on occasion cannot be regarded as the equivalent to the right to a trial by jury secured by the Seventh Amendment."

In the present case the court of equity below had no power in the teeth of the Seventh Amendment to the Constitution to decide upon the title to the specific property in question, the possession of which was demanded by the cross bill; nor upon the right of possession; nor in case such possession could not be delivered, to inquire into and decide upon its value, and to assess that value as damages against the cross-defendant; nor to appraise and award damages for the loss of business abandoned in execution of its agreement by appellee; nor to inquire into and decide upon the amount of profits or earnings claimed as incident to the possession or use of the property in question; or to render a money judgment for any of these in any form against the

cross-defendant. As to each and all of these things the general powers of the Court were limited, and the right of the defendant at common law was protected, by the constitutional guaranty.

Plainly in each of these cases decided by this Court, which we have cited, it was the *judgment* of this Court that *taking cognizance in equity of the issues presented* would be *in itself a denial* of the constitutional right. If taking such cognizance of those issues and proceeding to judgment upon them involved denial of the guaranteed right, that would be necessarily because *the case* involved the *application* of the Constitution. It follows inevitably that taking cognizance in the present case of the issues presented by the cross-bill was itself a denial of the constitutional right; and the right was thereby denied because the application of the Constitution was involved in the case. It may be true that not every bill which is alleged to be without equity involves necessarily the application of the Constitution. On the other hand, it is equally true that not every bill must fail to involve the application of the Constitution, because it may be said to be without equity. If a bill "be grounded on a merely legal right" (*Lewis* v. *Cox*, *supra*), cognizable at law and triable by jury when the Constitution was adopted, the fact that it may also be said to be "without equity" will not prevent the Court from seeing in any case, (and for that purpose the Court will look into the bill* and the record†) that its cognizance would deny a right guaranteed by the Seventh Amendment. This is illustrated by the above cases of *Whitehead* v. *Shattuck*, of *Scott* v. *Neeley*, and of *Cates* v. *Allen*. They fall within "*the extent* to which the Seventh Amendment "forbids any infringement of the right of trial by "jury *as fixed by the* common law." This "distinction of jurisdiction" eliminates from the discussion all the cases cited in the argument of appellee in support of this motion.

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* *Hipp* v. *Babbin*, *supra*

† *Killan* v. *Ebbinghaus*, *supra*.

II.

The case presented involves the application and the construction of clause 1, *Section* 10, *of the first article of the Constitution, which provides that no State shall pass any law impairing the obligation of contracts.*

It has been already stated that certain railway contracts were expressed to run "during the contin- "uance of the incorporation" of the Central Transportation Company. That company was incorporated at that time under a general law of Pennsylvania, with a life limited under the act to twenty years, which period was to expire December 30, 1882. In 1870, many years after the contracts were made, a special act of the Legislature of Pennsylvania was procured by that company, which gave it an additional term of corporate life for a period of ninety-nine years, commencing at the expiration of its then existing term of incorporation. Appellee claimed, and the Court below held, that *by effect of this statute* these contracts became obligatory and their operation was extended for that additional period. No assent of the several railways at any time is pretended.

The claim of appellant may be briefly stated, and the ground of it is obvious. It claimed that the contracts were made with exclusive reference to the then existing charter and term of incorporation. A corporate charter is a contract with the State. The term of corporate life is a part of such a contract. The charter is a contract for precisely what is affirmatively granted, and no more. The Central Transportation Company was given by its contract a corporate life for twenty years. At the time these railway contracts were made it was entitled to that term of corporate life; and it had no shadow of right to more. That grant of corporate prerogative was a contract with the State, and the railway agreements were independent contracts be-

tween the parties to them, founded on that contract with the State and limited by its limitation. This contract with the State, this charter, and this only, was in existence when the railway contracts were made and was the basis of them, and was the "incorporation" to which they referred. Any grant of additional corporate life must be the result of another and distinct contract between the State and the Central Transportation Company, and by that the pre-existing contracts with the railways could not be affected without a new agreement to that effect with them, which is not pretended. Laws existing at the time of the making of the contract enter into the contract as a part of it. "This embraces alike those which affect its validity, *construction*, discharge and enforcement" (*Walker* v. *Whitehead*, 16 Wall., 317); and laws impairing its obligation are unconstitutional, or *they cannot be applied to* the contracts previously existing (*McCracken* v. *Hayward*, 2 How., 612; *Ogden* v. *Saunders*, 12 Wheat., 256). Accordingly, it was the claim of appellant that if the Act of 1870 would have the effect claimed by the appellee and declared by the Court, then the act itself was *to that extent* void, as being in contravention of that provision of the Constitution of the United States which prohibits on the part of the States any enactment impairing the obligation of contracts (Cons., U. S., Art. 1, Sec. 10, Cl. 1).

The argument is made by appellee that, although such is the legal effect and operation of the statute upon the contracts, still the Constitution is not contravened, because the statute does not specifically refer to the contracts and did not in terms "purport to affect the contracts in any way." The inquiry arises, therefore, whether the *meaning and operation* of the Constitution are so limited that a statute of a State may *have the legal effect upon* pre existing contracts which is upheld in the present case, and the Constitution fail of the protection which it was intended and purports to

establish. It seems to counsel for appellant hardly open to argument, but that these questions present here a case which involves the application and *also* the construction of the Constitution of the United States. Our *claim* is that the contracts expressed to run "during the continuance of the incorporation" of the Central Transportation Company expired in 1882. This claim was denied by the Court below upon the ground of the *effect upon them* of the subsequent act of the Legislature of Pennsylvania of 1870. It was held that the statute operated upon these contracts so as to convert them *by its own force* from contracts having twelve years to run into contracts having one hundred and eleven years' duration. It is true the act does not in terms refer to these contracts, and that this effect would ever be claimed was never suspected when it was enacted. But *when the contracts are so construed as to bring them within* such operation and effect of the act, and when on that ground the *claim* of appellant *is denied* that the contracts expired in 1882, the question is presented at once whether such effect of the act is not forbidden and precluded by the Constitution of the United States. If the act when passed was without effect upon these pre-existing contracts, then no question concerning it arises here, and the contracts expired in 1882; but if, when it was passed, it had the character *now accorded to it by the Court below*, then a question of the application of the Constitution arises at once. Against the contention of the appellant they were held to be extended by the effect upon them of that statute, and in no other way. Can it be a sound interpretation of the Constitution that it is solicitous only about the forms and phrases of the State legislation and is otherwise indifferent as to its legal effect and operation upon pre-existing contracts? Or, if the general terms of a law fail to mention specifically particular contracts as intended to be affected by it, that contracts not so mentioned or in terms referred to are beyond the protection of the Constitution and *may*

be impaired in their obligation, limited, enlarged or changed in their meaning and effect with impunity? These questions seem clearly to make a case involving the application and construction of the Constitution of the United States.

III.

The Act of Congress of March 3, 1891, by a separate clause, provides an appeal direct to the Supreme Court:

> "In any case in which the * * * law of a State is CLAIMED to be in contravention of the Constitution of the United States."

These contracts when made were by their terms to expire December 30, 1882. Left to themselves and unaffected by any subsequent or extraneous force, they would without dispute have expired at that date. When the Act of 1870 was passed by the Legislature of Pennsylvania these contracts had twelve years to run. The claim of the appellant and the ground of it and its denial by the Court below are already sufficiently stated. "The objection " to a law on the ground of its impairing the obliga- " tion of a contract can never depend upon the ex- " tent of the change which the law effects in it. " Any deviation from its terms by postponing or ac- " celerating the period of performance which it pre- " scribes, imposing conditions not expressed in the " contract or dispensing with the performance of " those which are, however minute or apparently " immaterial in their effect upon the contract of the " parties, impairs its obligations" (*Green* v. *Riddle*, 8 Wheat., p. 84. The conclusions of the Master and of the Court supported the insistence of the appellee and it was *held* that in 1885 these were *still* existing and valid contracts for the prolonged term.

By the clear terms of the Act of Congress the right of appeal is given in any case where such a *claim* is interposed. It is the *existence* of the claim, and not its correctness, which is made the ground of the appellate jurisdiction. The claimant may be right in his position, or he may not; but *upon* that question he is given a right to the judgment of this Court. Such is the unequivocal language of the Act of Congress; and its plain import is in accord with the decisions of this Court in similar cases.

There is in the argument of appellee upon the relation of this statute to the Constitution an undercurrent of suggestion that the result is effected not directly by the effect and operation of the statute, but indirectly by a *construction of the contracts*, which brought them within the effect of the statute. But the fact remains that without the statute the contracts would inevitably expire in 1882. Their prolongation is brought about only by the *operation upon them* of the statute; while, also, the fact of the *claim* of the appellant, upon which a right to the judgment of this Court is given, remains in the record, and is a statutory basis of appellate jurisdiction. Among the other decisions of this Court, cited below, are those also which establish that the theory of construction suggested is without significance or bearing upon the situation.

The twenty-fifth section of the Judiciary Act of 1789 gave appellate jurisdiction to this Court from the highest court of law or equity in a State, in cases *inter alia*—

> "Where is drawn in question the construction of any clause of the Constitution, of any treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption, specially set up or CLAIMED by either party under such clause of the said Constitution, treaty, statute, or commission."

Uniformly this Court has held that, where the record disclosed a *claim* of the character thus indicated, the existence of the claim *gave appellate jurisdiction to the Court to examine and decide upon the correctness of the claim.* Such was the decision in *Railroads* v. *Richmond*, 15 Wall., 3, where the whole matter is presented in the short opinion of CHASE, Chief Justice:

> "The defendants in error move to dismiss the writ of error on the ground that the 'record does not show a state of facts that makes any Act of Congress apply to the case.' The record does show, however, that the present plaintiffs in error *claimed* in the State Court, that contracts made with the defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of certain Acts of Congress, approved June 15, 1866, and July 25, 1866, and also that the decision of the Supreme Court of Iowa *denied this claim.* The motion to dismiss must, therefore, be denied."

The case of *Hall* v. *Jordan*, 15 Wall, 393, was likewise brought to this Court as within the twenty-fifth section of the Judiciary Act. Here, also, the whole matter is stated in the short opinion of the Chief Justice:

> "The defendant *claimed* that a deed offered in evidence was void, because the stamps upon it amounted only to $13 when they should have been $13.50. The Court admitted the deed, although the Act of Congress provided that no deed not properly stamped should be received in evidence. The decision was against the right *claimed* by the defendant under the Act of Congress, and necessarily involved its construction."

Subsequently upon a hearing of this case, 19 Wall, 271, the Court affirmed the judgment below upon the merits, while at the same time it punished, under the twenty-third rule, the party who had

brought so frivolous a question here, by a judgment of ten per cent. damages in addition to interest and costs.

Section 709 of the Revised Statutes gives similar appellate jurisdiction to this Court in cases

> "Where any title, right, privilege or immunity *is claimed* under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up *or claimed by either party* under such Constitution, treaty, statute, commission or authority."

Edwards v. *Elliott*, 21 Wall, 532, was a writ of error to the Court of Errors and Appeals of New Jersey. A statute of New Jersey gave mechanics a lien on vessels for building, and provided for its enforcement. In a suit brought under that statute the State Court held that a contract for *building* a vessel was not a maritime contract, and that the lien law of the State did not conflict with the Constitution of the United States. This Court said that those two questions had been undoubtedly raised by defendant in the State Court, and decided adversely to him. It affirmed the judgment of the State Court; but it *took jurisdiction of the appeal* under Section 709 of the Revised Statute, because a *claim* involving a question of the Constitution was made by one of the parties and decided adversely by the State Court, although the claim itself was erroneous and the decision of the State Court was correct.

In *Home Insurance Co.* v. *City Council of Augusta*, 93 U. S , 116, the syllabus is as follows:

> "Where a statute of, or authority exercised under, a State is drawn in question, on the ground of its repugnance to the Constitution of the United States, *or a right is claimed* under that instrument, the decision of a State Court in favor of the validity of such statute or authority, or adverse to the right so *claimed* can be reviewed here."

An insurance company, licensed in conformity to the laws of Georgia, and holding a certificate from the Comptroller General authorizing it to transact business in that State, *claimed* immunity from an ordinance of the City Council of Augusta imposing a license tax, *claiming* that the ordinance was in violation of that clause of the Constitution which declares that no State shall pass any law impairing the obligation of contracts. The case was a writ of error to the Supreme Court of the State of Georgia, which held that the ordinance was not in contravention of the Constitution. In this Court it was insisted that this Court had no appellate jurisdiction in the case. Mr. Justice SWAYNE said:

> "Here there was drawn in question the authority exercised by the city council under the State in passing the ordinance imposing the tax complained of. The question raised was as to its repugnancy to the Constitution of the United States; and the decision was in favor of the validity of the authority so exercised. A right was also *claimed* under the Constitution of the United States. The decision was adverse to *the claim*. The case is, therefore, *within two* of the categories we have stated. The jurisdictional objection cannot be maintained."

This Court, nevertheless, affirmed the judgment of the Supreme Court of Georgia, clearly establishing that it was the *existence* of the claim, and not its correctness, which gave appellate jurisdiction to this Court.

In *Chicago Life Ins. Co.* v. *Needles, Auditor*, 113 U. S,, 574, the appellant was a corporation of the State of Illinois, and it is stated in the opinion that "the main proposition of the counsel was that the "obligation of the contract which the company had "with the State in its original and amended charter "*would be* impaired if that company were held sub-"ject to the operation of subsequent statutes regu-

"lating the business of life insurance, and author-
"izing the courts in certain contingencies to suspend,
"restrain or prohibit insurance companies incorpor-
"ated in Illinois from further continuance in busi-
"ness." The opinion further states that "at the
"final hearing" the company "moved the Court
"upon written grounds for a final decree in its
"behalf; one of which was that the statutes of the
"State under which these proceedings were had
"were in violation of the Constitution of the United
"States in that they impaired the obligation of the
"contract between the State and the company, as
"well as the contracts between the company and its
"policyholders and creditors." Mr. Justice HARLAN, in the opinion, proceeds as follows:

> "But the final judgment necessarily involved adjudication of that *claim*; for if the statutes upon the authority of which alone the auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This Court, therefore, has jurisdiction to inquire *whether* any right or privilege protected by the Constitution of the United States, *has been withheld or denied* by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this Federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a Federal nature must, therefore, be denied."

Clearly it was the *existence of the claim* of right and its *denial* which gave the appellate jurisdiction, and gave the authority to this Court on appeal to decide whether the claim was or was not well founded. In the actual case it was held by this Court that it was not well founded, and the judgment below was affirmed.

Wilmington and Weldon Railroad v. *Alsbrook*, 146 U. S., 279, was a writ of error to the Supreme Court of North Carolina. A State law incorporating a railroad exempted its property from taxation. Subsequently another State law provided for an extension of the road and the building of branch lines. The property of these branch lines was taxed by the State under the revenue law of 1891, and the question arose, under a claim to that effect, whether such property was within the contract of exemption contained in the original charter. The State Court held that it was not.

In argument on the question of the appellate jurisdiction of this Court, counsel for defendant in error said: "The decision of the State Court is "based upon a *construction of the contract* itself. "It concedes its validity, but denies that a certain "class of property is within its terms, hence the "writ of error should be dismissed."

Mr. Chief Justice FULLER said:

> "The jurisdiction of this Court is questioned upon the ground that the decision of the Supreme Court of North Carolina conceded the validity of the contract of exemption contained in the act of 1834, but denied that particular property was embraced by its terms; and that, therefore, such decision did not involve a Federal question.
>
> "In arriving at its conclusions, however, the State Court *gave effect* to the revenue law of 1891, and held that the contract *did not confer the right of exemption* from its operation. *If it did*, its obligation *was impaired by the subsequent law*, and as *the inquiry whether it did or not* was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S., 18, 38."

Recurring for a moment to the case at bar, we call attention to the similarity in the situation.

If our *claim* is correct that these contracts are to be taken as they stood in terms, and that they referred only to the then existing charter of the Central Transportation Company, then incontestably the alleged operation of the Pennsylvania Statute of 1870 is in contravention of the Constitution. If, however, the appellee is entitled to introduce into them other words so that they shall substantially read: "During the continuance of the *present* incorporation *and during any other term of incorporation* "*that may be hereafter granted by any Acts of the* "*Legislature*," then the Act of 1870 may not be in such contravention. But *whether* the contracts were such in legal effect, whether they may be legally read as if those additional words were in them, is *the question by which* it must be determined *whether* the Constitution *is contravened or not* by the statute of the State. That question is one necessarily for the determination of this Court, and the appellate jurisdiction is conferred for that purpose.

The case of *Mobile and Ohio R. R.* v. *Tennessee*, 153 U. S., 486, was a writ of error to the State Court. The question was whether revenue acts of the State impaired, as was claimed, the obligation of a contract contained in the railway charter exempting its property from taxation. The State Court held that the exemption given in the charter was in violation of the State Constitution and void. Against the appellate jurisdiction of this Court it was urged that *in view of the decision of the State Court there was no contract in existence* to be impaired, the supposed contract being void. In the opinion Justice JACKSON said:

> "The question of the existence or non-existence of a contract in cases like the present is one which this Court will determine for itself, the *established rule being* that where *the judgment* of the highest court of a State, by its terms or necessary operation, *gives effect to some provisions of the State law* which is *claimed* by the unsuccessful party to impair the contract set out and relied on, this Court

> has *jurisdiction to determine* the question *whether* such a contract *exists as claimed*, and *whether* the State law complained of impairs its obligation."

In the case of *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S., 30, this Court stated that the clause of the Constitution concerning the impairment of contracts is aimed at the legislative power and not at the rulings of the courts. Apparently a pure illustration of this is found in the case of the *Central Land Co.* v. *Laidley*, 159 U. S., 103. There the Act of the State Legislature complained of *was in full force at the time the contract in question was made*, and therefore could not impair its obligation. *A decision of the State Court changing the prior construction of the Act* did impair the obligation of the contract, but this was not within the intention of the United States Constitution. The Court did not give effect (in construing the contract) to a *subsequent law* which was claimed to be in contravention of that Constitution.

In *Huntington* v. *Attrill*, 146 U. S., 647, there was question whether a State court had by its judgment given full faith and credit to the judgment of another State, and this depended on whether the latter judgment was upon a cause of action *penal* in its nature. In laying down the rule that the United States Supreme Court must determine for itself whether or not the said cause of action was penal, Mr. Justice GRAY used (p. 684) the following language:

> "The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State *decides nothing but* the original construction and obligation of a contract, this Court has no jurisdiction to review its decision; but if the State Court *gives effect to a subsequent law, which is impugned* as impairing the obligation of a contract, this Court has power, in order *to deter-*

> *mine whether* any contract has been impaired, to decide for itself *what the true construction of the contract* is."

In *Williams* v. *Louisiana*, 103 U. S., 637, which was a writ of error to the Supreme Court of that State, the Attorney-General sought to restrain payment on certain bonds of the State on the allegation that they were illegal because an attempt to create a debt beyond the limit fixed by an amendment to the State Constitution, that limit having already been exceeded. The State Supreme Court affirmed a judgment that the bonds were void, and the writ of error sought to review that judgment. The defendants insisted that the writ of error should be dismissed for want of jurisdiction. It was claimed, however, on the other hand, that the bonds in question represented an obligation which existed prior to the constitutional amendment, and that they therefore did not increase the debt existing when that amendment was adopted. In the opinion of this Court, Mr. Justice MILLER said:

> "This is denied by the counsel for the State, and *upon the solution* of this question *the whole case depends, both* as to its merits *and as to the jurisdiction of this Court.* For it is insisted by plaintiffs in error that *if their contract existed in effect before* the amendment, the *amendment as construed by the State Court impairs the obligation of that contract*, and this Court can review that question; while if the bonds constitute a new and independent contract, the constitutional provision was properly applied to them and the judgment is right. *As this is the question we are to decide* and as it was raised and insisted on by the plaintiffs in error in the Court below, we think *this Court has jurisdiction.*"

This would seem to be precisely the question before the Court in the present case. In the case just cited, the *claim* that the contract was impaired in contravention of the Constitution of the United

States gave appellate jurisdiction to examine the *question upon which* the question of impairment or not of obligation depended.

University v. *People*, 99 U. S., 309, was a writ of error to the Supreme Court of Illinois. The State Constitution of 1848, then in force, provided that such property as the General Assembly might deem necessary for school, religious and charitable purposes might be exempt from taxation. The charter of the university, as amended in 1855, provided "that all property of whatever kind or description "belonging to or owned by the corporation shall be "forever free from taxation." Certain property of the University was taxed in the year 1874 under the Revenue Law of 1872, which sought to conform the State law on taxation to provisions of the new Constitution of 1870, and which exempted from taxation only such property of institutions of learning as was not used with a view to profit. The Supreme Court of the State held the property in question liable to taxation. On a motion to dismiss the appeal for want of jurisdiction the argument in support of the motion is thus stated in the opinion of the Court:

> "The argument is that the judgment of the State Court is limited *to a construction* of the fourth clause of the amendatory charter in 1855, as it is affected by the constitution under which it was enacted, and that whether that statute was a contract or not, or whether it was properly construed or not, it is still but the decision of a Court *construing a contract* or a statute, and there is no law of the State impairing the obligation of that contract, within the meaning of the Constitution of the United States."

This Court held, however, as in *Wilmington & Weldon R. R.* v. *Alsbrook*, *supra*, and in *Huntington* v. *Attrill*, *supra*, that the State court *went farther* than to decide merely on the construction of

a contract, *for it also gave effect* to subsequent laws which *were impugned* as impairing the obligation of the contract. Mr. Justice MILLER said:

> "If, therefore, the legislation of 1855 *was* a contract which exempted the property in question from taxation, and by the laws of 1872, as construed by the Supreme Court, it is held liable to taxation, it *is manifest that it is the law of 1872* and the Constitution of 1870 *which impairs* the obligation of that contract, *however the Court, by an erroneous construction of that contract, may be led to hold otherwise.* * * * *If it is a contract*, as is contended for by plaintiff's counsel, which, under a true construction of the Constitution of 1848, exempts all the property of the plaintiff which is held by it for appropriation to the purposes of the university as a school, as an institution for teaching, and which is held for no other purpose whatever, and which can as effectually promote the purpose by leases, of which the rent goes to support the school, as in any other way, *then* the law of 1872 and the Constitution of 1870 *do, to the extent of the difference arising from these two constructions*, impair the obligation of the contract of 1855.
>
> "*Whether* that contract *is such as to be impaired* by these later laws is one of the questions of which this Court always has jurisdiction (*Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Bridge Proprietors* v. *Hoboken*, 1 Wall., 144; *Delmas* v. *Insurance Company*, 14 *Id.*, 668.)"

In the case itself the Court held that the contract *was such as to be impaired* by the later laws, and that the property in question was exempted from taxation by the charter contract. In the foregoing case the question turned entirely upon the *construction of the contract* contained in the charter of the university and upon the *claim* of right presented by the plaintiff in error. The State Court erroneously construed that contract so that, *as so construed*, its obligation was not impaired by the subsequent

revenue law. This Court took jurisdiction upon the claim of the plaintiff in error, because *if the correct construction was as claimed by the plaintiff in error*, then that revenue law, if applied, would impair its obligation. It is doubtless unnecessary to suggest that in the present case, if the railway contracts in question are construed to be in *legal effect* what they read in terms and what the appellant claims them to be, then the Pennsylvania statute of 1870, as applied by the Court below, manifestly impairs their obligation; and "*whether*" those contracts were "*such as to be impaired by*" the later law "is one "of the questions of which this Court always has "jurisdiction."

In *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.*, 125 U. S., 18, the Court by Mr. Justice GRAY said (p. 38):

> "The result of the authorities applying to cases of contracts the settled rules, that in order to give this Court jurisdiction of a writ of error to a State court, a federal question must have been, expressly or in effect, decided by that Court, and therefore that when the record shows that a federal question *and another* question were presented to that Court, and its decision turned on *the other* question only, this Court has no jurisdiction, may be summed up as follows: When the State court decides against a right *claimed under a contract*, and there was no law subsequent to the contract, this Court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the State upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this Court has jurisdiction. When the State court holds that there was a contract conferring certain rights and that the *subsequent law did not impair* those rights, this Court has jurisdiction *to consider the true construction of the supposed contract*, and if it is of opinion that it did not confer the rights claimed by the State court, and there-

fore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the State court *upholds the subsequent law*, on the ground that *the contract did not confer* the right *claimed*, this Court *may inquire whether* the supposed contract did give the right, *because if it did the subsequent law cannot be upheld.* But when the State court *gives no effect* to the subsequent law, but decides on grounds independent of that law that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed and this Court has no jurisdiction."

C. A. H. Winterstein

Robert J. Lincoln

Edward S. Isham

Joseph H. Choate.